Supreme Court, U.S.
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No. 88-506

In The
Supreme Court of the United States
October Term, 1988

ALPHA BETA COMPANY, CAROLE COLE AND LYNNE COPPIN,

Petitioners,

vs.

RITA NAHM,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO CALIFORNIA COURT OF APPEAL FOR THE FIRST APPELLATE DISTRICT AND TO THE CALIFORNIA SUPREME COURT

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QUESTIONS PRESENTED

1. Is a state tort claim for intentional infliction of emotional distress preempted by federal labor law where adjudication of the claim does not require interpretation or examination of a collective bargaining agreement, and where the matters complained of are deeply rooted in local feeling and merely of peripheral concern to the federal labor law?

2. Where a state tort claim for intentional infliction of emotional distress is not preempted by federal labor law, is the claimant required to exhaust administrative remedies provided by the collective bargaining agreement?

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I.

STATEMENT OF THE CASE

The California Supreme Court has, once again, properly permitted an employee to maintain an action for intentional infliction of emotional distress against an employer who engages in a concerted course of conduct designed to harass, humiliate and upset the employee, correctly holding that the particular state tort claim alleged by Real Party in Interest, Rita Nahm (hereinafter "Rita Nahm") is not barred by the federal preemption doctrine.

The decision of the California Supreme Court preserves important rights of similarly situated employees throughout the State and, more importantly, makes the employer accountable in damages for such abusive and outrageous conduct. Employers should not be permitted to use the collective bargaining agreement as a shield to protect against legitimate damage claims by employees who have been subjected to abuse. A reversal of the California Supreme Court would signal employers throughout the country that they may act with virtual impunity under circumstances similar to those alleged and endured by Rita Nahm.

A. The Facts

Rita Nahm became an employee of Petitioner Alpha Beta when she was hired as a clerk to work in the bakery of one of Petitioner's supermarkets in May of 1980. She was a member of the Retail Clerks Union which had entered into a collective bargaining agreement with Petitioner on behalf of its employees. During the last six months of her employment with Petitioner, from approxi-

mately September of 1981 through February of 1982, two of her superiors subjected her to a number of episodes and encounters which were designed to harass, humiliate and upset her. This campaign culminated with a trumped up written warning for alleged insubordination on February 17, 1982. Rita Nahm became so severely distraught as a result of this six month campaign against her that she never returned to work.

On August 17, 1982, Mrs. Nahm filed a complaint for compensatory and punitive damages in the Alameda County Superior Court against Alpha Beta and the responsible employees. The complaint alleges one cause of action for intentional infliction of emotional distress.

In her Complaint Rita Nahm alleges several specific instances of abusive conduct, including (1) the making of rude and humiliating comments by her superiors about her in front of customers and co-employees; (2) a decrease in the number of her working hours below those of other employees with less or the same seniority; (3) degrading her job performance in front of others; (4) causing her to perform the job duties of others; (5) asking her to work overtime and then verbally abusing and chastising her for doing so; (6) making false statements in documents in her personnel file to make it look as if she had been insubordinate; (7) discriminating against her in favor of other employees; (8) using foul and abusive language toward her; and then (9) refusing her request for a transfer to another store. (App. 2-3)

Rita Nahm would be willing to concede that, without more, an isolated complaint involving seniority and working hours, or causing one to perform another's job duties,

or discrimination, or a refusal of a request for transfer would require submission to the grievance machinery provided in the collective bargaining agreement. However, not surprisingly, there is nothing in the collective bargaining agreement which touches on the abuse, degradation or chastisement of which she complains. Moreover, with regard to all the allegations, *it is the particularly abusive manner in which this concerted course of conduct over a six month period was carried out which forms the heart of her complaint.* It is contended that these numerous "episodes and encounters [were] designed to harass, humiliate and upset" her. (App. 3)

From the outset of this case, Petitioner has attempted to distort the clear allegations of Rita Nahm's Complaint and to transform it from a properly pled intentional tort into a breach of contract action. This effort has repeatedly been rejected by the California Courts and should be rejected by this Court.

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II.

REASONS FOR DENYING THE WRIT

A. RITA NAHM'S TORT CLAIM IS NOT PREEMPTED BY SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT SINCE ADJUDICATION THEREOF IS NOT SUBSTANTIALLY DEPENDENT UPON ANALYSIS OF THE COLLECTIVE BARGAINING AGREEMENT.

The California Supreme Court has correctly held that Rita Nahm's state tort claim is not preempted by Section 301 of the Labor Management Relations Act ("LMRA"). [29 U.S.C. Section 185(a)].

It is well settled that Congress did not intend to preempt "all local regulation that touches or concerns in any way the complex interrelationships between employees, employers and unions." *Motor Coach Employees v. Lockridge,* 403 U.S. 274, 289, 91 S.Ct. 1909, 1919, 29 L.Ed.2d 473 (1971).

Section 301 of the LMRA confers jurisdiction upon the Federal District Courts with respect to suits for violation of collective bargaining agreements. 29 U.S.C. Section 185(a). This Court has acknowledged that Congress provided little guidance with respect to the extent it intended Section 301 of the LMRA to preempt state law.

> "In such instances courts sustain a local regulation 'unless it conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the states.'" *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202, 208 (1985), quoting *Malone v. White Motor Corp.,* 435 U.S. 497, 504 (1978).

In *Allis-Chalmers,* this Court concluded that the state tort claim was preempted by Section 301 of the LMRA because the right asserted as the basis for the state tort claim necessarily was derived from the collective bargaining agreement. (*Allis-Chalmers Corp. v. Lueck, supra,* 1056 S.Ct. at p. 1912.) The need for a uniform body of federal law in interpreting contract provisions was cited. (*Id.* at p. 1910.) Since the bad faith tort claim could not be resolved without interpretation of the collective bargaining agreement, the claim was preempted by federal law. (*Id.* at p. 1912.)

However, this Court emphasized that its holding was one of "narrow focus" (*Id.* at p. 1916), and made it clear

that actions involving state rights which exist independently of the labor contract are not preempted.

> "In extending the preemptive effect of Section 301 beyond suits for breach of contract, it would be inconsistent with congressional intent under that section to preempt state rules *that proscribe conduct, or establish rights and obligations, independent of labor contract.*" (*Id.* at pp. 1911-1912.) (Emphasis added.)

Moreover, the opinion reiterated the well established rule that:

> " . . . not every dispute concerning employment, or tangentially involving a provision of a collective bargaining agreement, is pre-empted by federal labor law." (*Id.*)

In concluding, it was once again emphasized that the scope of the decision was limited:

> "Nor do we hold that every state-law suit asserting a right that relates in some way to a provision in a collective bargaining agreement, or more generally to the parties to such an agreement, necessarily is pre-empted by Section 301. The full scope of the pre-emptive effect of federal labor-contract law remains to be fleshed out on a case-by-case basis." (*Id.* at p. 916.)

Finally, the court held that there is no preemption under Section 301 unless resolution of a state tort claim is *"substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract."* (*Id.*) (Emphasis added.)

Rita Nahm's cause of action for intentional infliction of emotional distress may be adjudicated without analysis of the collective bargaining agreement, for it is the particularly abusive manner in which she was treated by her

supervisors, the reasons behind the abuse, and the concerted course of conduct over a six month period which give rise to her rights under California tort law.

Under California law, the elements of the tort of intentional infliction of emotional distress are: *Intentional or reckless conduct* which is *sufficiently outrageous* to foreseeably result in *severe emotional distress.* (See *Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 497-499; 468 P.2d 216, 220-222.)

In *Lingle v. Norge Div. Of Magic Chef, Inc.,* — U.S. —, 108 S.Ct. 1877 (1988), this Court analyzed the elements required to prove an employee's claim for retaliatory discharge under Illinois law and concluded that:

> "Each of these purely factual questions pertains to the conduct of the employee and the conduct and motivation of the employer. Neither of the elements requires a court to interpret any term of a collective-bargaining agreement. . . Thus, the state-law remedy in this case is 'independent' of the collective-bargaining agreement in the sense of 'independent' that matters for § 301 pre-emption purposes: resolution of the state-law claim does not require construing the collective-bargaining agreement." (At 108 S.Ct. 1877, 1882.)

Lingle further acknowledged that:

> " . . . even if dispute resolution pursuant to a collective bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement for § 301 pre-emption purposes." (*Id.* at p. 1883.)

Similarly, in Rita Nahm's case, adjudication of her claim under California law does not require analysis or

interpretation of the collective-bargaining agreement, but, rather, the conduct and motivation of the employer.

Mrs. Nahm was subjected to a concerted course of abusive and outrageous conduct over a period of six months. This claim does not implicate the terms of the collective bargaining agreement. Whether the conduct complained of was sufficiently outrageous and intentional cannot be determined by reference to the labor contract. The fact that some of the conduct complained of may "relate in some way to provisions of the labor contract" is inconsequential, as *Allis-Chalmers* and *Lingle* point out, because it is the motivation behind the manner in which she was treated which forms the basis of Mrs. Nahm's complaint. The specific incidents of which Mrs. Nahm complains were not isolated, but, rather, each was part of a concerted course of conduct which was intended to harass, humiliate and upset her. As the California Court of Appeal noted, Mrs. Nahm's state tort claim is based on her right, independent of contract, to be free from conduct so reprehensible that no reasonable person in a civilized society should be expected to endure it. Such a right is not subject to negotiation. In sum, adjudication of Mrs. Nahm's tort claim is not "substantially dependent" upon analysis of the labor contract and is not preempted by Section 301 of the LMRA.

B. PREEMPTION IS NOT MANDATED WHERE THE MATTERS COMPLAINED OF ARE OF LEGITIMATE LOCAL CONCERN AND MERELY OF PERIPHERAL CONCERN TO THE FEDERAL LABOR LAW.

The preemption doctrine has also been analyzed in the context of conduct which actually or arguably constituted violations of the National Labor Relations Act ("NLRA") and would, therefore, be subject to the jurisdiction of the National Labor Relations Board.[1] See, e.g., *San Diego Bldg. Trades Council v. Garmon,* 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959); *Farmer v. Carpenters,* 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977).

In *Garmon,* the Supreme Court held that a State's attempt to regulate activities protected by Section 7 of the NLRA (29 U.S.C. Section 157) or which constitute unfair labor practices under Section 8 (29 U.S.C. Section 158), is preempted by federal labor law.

Farmer, however, modified the so-called *Garmon* preemption rule by holding that certain activity would not be preempted by federal labor law where such activity was "merely a peripheral concern of the Labor Management Relations Act . . . or touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Con-

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[1] Although *Allis-Chalmers* suggests that the so-called *Garmon* preemption (balancing of state and federal interests test) was not relevant under the circumstances of that case (see *Allis-Chalmers,* 105 S.Ct. at pp. 1912-13, fn.9), the California Court of Appeal held that pre-emption was not mandated in this case under either the *Garmon* test or that announced in *Allis-Chalmers.*

gress had deprived the states of the power to act." *Farmer v. Carpenters, supra,* 430 U.S. at pp. 296-297.

The analysis set forth in *Farmer* is particularly significant. In that case, which also originated in California, a state tort claim for intentional infliction of emotional distress was held not to be preempted upon allegations that Farmer's decedent, Hill, had been subjected to a campaign of personal abuse and harassment and had been discriminated against in referrals from the hiring hall. In holding that there was no preemption, it was noted that there is no provision of the NLRA (nor in the collective bargaining agreement herein) which protects the outrageous conduct which is an essential element of the tort of intentional infliction of emotional distress under California law. (*Farmer v. Carpenters, supra,* at p. 302.) While acknowledging that there might be some risk that the state cause of action for intentional infliction of emotional distress would touch on an area of federal concern (*Id.* at p. 303), the legitimate and substantial interest of the State in protecting its citizens from such conduct outweighed any such risk (*Id.* at p. 304) and the state tort action could be resolved without resolution of the merits of any underlying labor dispute. (*Id.*)

> "On balance, we cannot conclude that congress intended to oust state-court jurisdiction over actions for tortious activity such as that alleged in this case. . . . Simply stated, it is essential that the state tort be either unrelated to employment discrimination *or a function of the particularly abusive manner in which the discrimination is accomplished or threatened . . .*" (*Id.* at p. 305.) (Emphasis added.)

Not only does Rita Nahm allege a course of conduct which is not addressed by the collective bargaining agree-

ment, but she complains primarily of the particularly abusive manner in which this six month campaign of harassment, humiliation and abuse was carried out. If anything, the conduct alleged in *Farmer,* and upon which the Court found no preemption, was of a lesser degree than that which Rita Nahm had to endure. And, as in *Farmer,* surely it cannot be concluded that Congress intended to oust the California court of jurisdiction over an action for the type of tortious activity such as that alleged in this case, a matter which is clearly of legitimate local concern. (Cf., e.g., *Alcorn v. Anbro Engineering, Inc., supra,* 2 Cal. 3d 493, 497-498.)

Thus, under either the *Garmon* analysis, or that set forth in *Allis-Chalmers* and *Lingle,* pre-emption is improper.

C. SINCE THERE IS NO PREEMPTION, RITA NAHM WAS NOT REQUIRED TO EXHAUST THE REMEDIES PROVIDED BY THE GRIEVANCE PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT.

The California Court of Appeal acknowledged the strong federal policy in favor of arbitrating labor disputes. (Petitioner's App. 18.) The Court also recognized that Petitioners were attempting to distort a "legitimate tort complaint" into a breach of contract action. (Petitioner's App. 19.)

If there is no preemption, of course there can be no requirement to invoke the grievance procedure set forth in the collective bargaining agreement. Moreover, there is nothing in the collective bargaining agreement which would

afford Mrs. Nahm the remedies to which she is entitled under state tort law, to wit, compensatory and punitive damages.

If Petitioners' contentions are accepted, Mrs. Nahm would have been required to file a grievance each time she was subjected to abuse during the specified six month period. It is submitted that the grievance machinery would suffer greatly if Mrs. Nahm or others similarly situated were required to file daily grievances.

The California Court of Appeal correctly concluded that the elements of the exhaustion doctrine have not been demonstrated and, in any event, exhaustion of remedies was not required under the circumstances of this case.

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III.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX "1"

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA
HAYWARD DISTRICT

NO. H-85473-9

RITA NAHM

Plaintiff,

-vs-

ALPHA BETA, INC., a corporation; CAROL COLE; LYNN COPPIN; and DOES 1 through 100,

Defendants.

COMPLAINT FOR DAMAGES
(Intentional Infliction of Emotional Distress)

COMES NOW, plaintiff RITA NAHM, and complains of defendants above named, and each of them, and for a cause of action alleges:

1. That the true names and capacities of the defendants sued herein as DOES 1 through 100 are unknown to plaintiff who therefore sues such defendants by such fictitious names. Plaintiff is informed and believes and so alleges that each defendant is negligently responsible in some manner for the events referred to and alleges that each DOE defendant is also responsible for breach of contract and in strict liability and for breach of warranties

which caused damages proximately thereby to plaintiff and prays leave to amend this, her complaint, to include the exact names and capacities of said defendants when the same can be ascertained together with the appropriate charging allegations.

2. Plaintiff is informed and believes, and thereon alleges that, at all times herein mentioned, defendant ALPHA BETA, INC., was a corporation authorized to do and doing business in the State of California and the County of Alameda.

3. At all times herein mentioned, defendants CAROL COLE and LYNN COPPIN were managerial level employees of defendant ALPHA BETA, INC. and were superiors of plaintiff.

4. Plaintiff is informed and believes and thereon alleges that, at all times herein mentioned, each defendant, including the fictitiously named defendants, was the agent, servant or employee of each remaining defendant, and was at all such times acting within the scope and purpose of such agency and that each act of each defendant was authorized and ratified by each remaining defendant.

5. Commencing in May of 1980, plaintiff was employed by defendant ALPHA BETA, INC. in the bakery department of the Alpha Beta store located at 1791 De Coto Road, in the City of Union City, County of Alameda, State of California. At all times herein mentioned, defendant CAROL COLE was the assistant store manager of the above mentioned Alpha Beta store. At all times herein mentioned, defendant LYNN COPPIN was the manager of the bakery of the above mentioned Alpha Beta

store. Commencing in approximately September of 1981, defendants above named and each of them, participated in episodes and encounters designed to harass, humiliate and upset plaintiff by, among other things, making rude and humiliating comments to and about plaintiff in front of customers and co-employees; decreasing her number of working hours below those of other employees who had less or the same seniority as plaintiff; degrading her job performance in front of others; causing plaintiff to perform the job duties of others; asking plaintiff to stay on and work overtime and then verbally abusing and chastizing her for doing so; making false statements in documents in plaintiff's personnel file to make it look as if plaintiff was being insubordinate to superiors; discriminating against plaintiff in favor of other employees; using foul and abusive language directed at plaintiff; refusing to honor plaintiff's request to be transferred to another store.

6. The aforesaid outrageous conduct of defendants, and each of them, was done intentionally and maliciously for the purpose of causing plaintiff severe emotional distress or with a conscious and reckless disregard of the likelihood that such conduct would cause plaintiff to suffer severe emotional distress.

7. As a direct and proximate result of said outrageous conduct by defendants, and each of them, plaintiff has suffered severe emotional distress, humiliation and mental anguish all to her general damage in a sum within the jurisdictional purview of this court.

8. As a further direct and proximate result of the above alleged conduct of the defendants above named, and

each of them, plaintiff was required to and did employ physicians and surgeons to examine, treat and care for her and did incur medical and incidental expenses, the exact amount of which is unknown to plaintiff at this time. Plaintiff is informed and believes that she will require further medical care in the future as a result of her severe emotional distress, humiliation and mental anguish and asks leave of court to amend her pleading to set forth the exact amount thereof when the same can be ascertained.

9. That as a further direct and proximate result of the above alleged conduct of the defendants above named, and each of them, plaintiff will lose and may continue to lose in the future, loss of earnings and earning capacity by reason of her severe emotional distress, humiliation and mental anguish; that the full amount and nature of said loss of earnings and earning capacity cannot be ascertained at the present time and plaintiff prays leave to amend this, her complaint, to include the amount of said loss of earnings and earning capacity when the same can be ascertained.

10. The aforesaid acts and conduct of defendants, and each of them, were done oppressively, maliciously and with a conscious disregard of plaintiff's rights and mental health and plaintiff therefore prays that punitive damages be assessed against each of the defendants in a sum appropriate to punish and set an example.

11. As a direct and proximate result of the conduct of the defendants, and each of them, as herein alleged, plaintiff is now or may hereafter be entitled to interest as provided by law.

WHEREFORE, plaintiff RITA NAHM prays for judgment against the defendants herein and each of them, as follows:

1. For general damages in a sum within the jurisdictional purview of this court;

2. For medical and incidental costs, according to proof;

3. For loss of earnings and earning capacity, according to proof;

4. For punitive damages, according to proof;

5. For costs of suit herein incurred; and,

6. For interest as is provided or as may hereafter be provided by law;

7. For such other and further relief as the court may deem just and proper.

GWILLIAM & IVARY

By /s/ Steven R. Cavalli